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THE RIGHT TO COUNSEL AND THE ROLE OF COUNSEL IN JUVENILE COURT PROCEEDINGS

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As courts are indispensable to the administration of criminal justice, so are lawyers indispensible to court operation for they provide the occupational specialties required—judges, prosecutors, defense counsel—and, at least in adult criminal cases, the place of each in the system has long been recognized. But this has been a decade of special development and re-definition of the role of counsel for the accused. Blending constitutionally based guarantees with sharpening insights as to the ascendant importance of legal representation as a catalyst for all procedural rights and the degree of governmental intervention needed to place rich man and poor man in de facto parity, the Supreme Court recently has generated a record of sweeping institutional change in this area.

In 1963, the Supreme Court determined in the landmark case of *Gideon v. Wainwright*[1] that counsel must be furnished in state felony courts for all indigent defendants. In a series of per curiam rulings and full opinions following *Gideon*, it was indicated that this requirement applied not only at trial but at arraignment,[2] possibly at sentencing,[3] at preliminary examination,[4] in certain circumstances shortly after arrest,[5] and most recently, in probation revocation proceedings.[6] *Gideon*, applicable only to felony proceedings on its facts but potentially inclusive of all criminal proceedings in reasoning and general language,[7] has been regarded by many as applying to at least serious misdemeanors and has

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1. 372 U.S. 335 (1963).

2. Berry v. New York, 375 U.S. 160 (1963); Vecchioli v. Maroney, 372 U.S. 768 (1963); Doughty v. Maxwell, 372 U.S. 781 (1963), *vacating* Doughty v. Sacks, 173 Ohio St. 407, 183 N.E.2d 368 (1962). *See also* Hamilton v. Alabama, 368 U.S. 52 (1961) (pre-Gideon capital offense case).

3. Keenan v. Burke, 342 U.S. 881 (1951); Townsend v. Burke, 334 U.S. 736 (1948), These were pre-Gideon cases, but Mempa v. Rhay, 389 U.S. 128 (1967), cited *Townsend* with approval as to right to counsel at sentencing in a case asserting the right in a combined probation revocation-deferred sentencing proceeding.

4. White v. Maryland, 373 U.S. 59 (1963).

5. Mirranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

6. Mempa v. Rhay, 389 U.S. 128 (1967). Where appeal is available as a matter of right, counsel must likewise be provided to indigent appellants in felony cases. Douglas v. California, 372 U.S. 353 (1963).

7. Mr. Justice Black's opinion for the majority in *Gideon* noted that a felony offense was before the Court but in the discussion and analysis he referred to "criminal prosecutions" and "persons charged with crime" rather than felony defendants as such. 372 U.S. 335 *passim* (1963).

been specifically so extended in at least one federal circuit[8] and several states.[9]

With a mandatory and comprehensive right to counsel thus firmly established for felony courts and on its way to significant recognition in misdemeanor courts, it was inevitable that the new adult standards would also be evaluated in juvenile courts.[10] One authority, writing shortly after *Gideon* for a national conference held in early 1964 on the lawyer's place in the juvenile court, voiced what many suspected:

> I contend that *Gideon v. Wainwright* . . . applies by implication to juvenile court delinquency proceedings, and that it is only a matter of time before the Supreme Court so applies it specifically.[11]

The confrontation came just three years later albeit with some high court forewarning.[12] In *In re Gault*,[13] the first Supreme Court decision to examine the constitutional legitimacy of the peculiar style of operation, procedure, and theory that has guided the operation of American juvenile

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8. McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).

9. Irvin v. State, ——— Ala. App.———, 203 So. 2d 283 (1967); *In re* Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965); Taylor v. City of Griffin, 113 Ga. App. 589, 149 S.E.2d 177 (1966), *cert. denied*, 385 U.S. 1016 (1967) (dictum in intermediate appellate court); People v. Witenski, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965) [now required by N.Y. COUNTY LAW § 722-a (McKinney Supp. 1967) (where misdemeanor carries potential jail penalty)], Braden v. State, 395 S.W.2d 45 (Tex. Crim. App. 1965); Tacoma v. Heater, 67 Wash. 2d 733, 409 P.2d 867 (1966). *See also* State v. Anderson, 96 Ariz. 130, 392 P.2d 790 (1964); Patterson v. State, 231 Md. 509, 191 A.2d237 (1963).

Counsel are also provided for misdemeanors by statute or court rule in California, Illinois, Maryland, Minnesota, New Hampshire, Oregon, Texas, Wisconsin, and other states. Silverstein, *Manpower Requirements in the Administration of Criminal Justice*, in PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 154 (1967).

10. By 1963, having commenced in the late 1950's, an expanding emphasis on procedural regularity and protection of legal rights was already well developed within the juvenile court movement itself. This was reflected in the positions and publications of the standard-setting professional associations. *See* STANDARD JUVENILE CT. ACT § 19 (1959); NATIONAL COUNCIL ON CRIME & DELINQUENCY, PROCEDURE AND EVIDENCE IN JUVENILE COURT (1962). For supplementation by a new and critical interest on the part of legal writers, see Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L. Q. 387 (1961); Beemsterboer, *The Juvenile Court-Benevolence in the Star Chamber*, 50 J. CR. L.C. & P.S. 464 (1960); Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME & DELINQUENCY 97 (1961); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); Remington, *Due Process in Juvenile Proceedings*, 11 WAYNE L. REV. 688 (1965).

11. Position Statement for Nat'l Conf. on the Role of the Lawyer in Juvenile Court, Chicago, Ill., Feb. 27-29, 1964 in NATIONAL COUNCIL OF JUVENILE COURT JUDGES, COUNSEL FOR THE CHILD 1 (1964).

12. Kent v. United States, 383 U.S. 541 (1966), affirming the necessity of effective assistance of counsel in waiver proceedings to transfer juvenile cases for trial in adult criminal courts.

13. 387 U.S. 1 (1967).

courts since their inauguration at the turn of the century,[14] the Supreme Court held, interalia, that *Gideon* applied at least to the trial stage of the juvenile process:

> [w]e conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parent must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[15]

The purpose of this article is to assess the impact of the *Gault* decision on the right to counsel and the role of counsel in American juvenile courts.[16] As detailed questions of scope, impact and role are analyzed, two pronouncements in *Gault,* relating, respectively, to the court's disclaimer as to the scope of the opinion and its view of the need for and role of counsel in juvenile court are of particular significance: first,

> [w]e do not in this opinion consider the impact of these constitutional provisions on the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process nor do we direct our attention to the post adjudicative or dispositional process. We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part with the consequence

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14. Juvenile Court Act of April 21, 1899, § 21, [1899] Ill. Laws 137.

15. *In re* Gault, 387 U.S. 1, 41 (1967).

16. The operation of juvenile courts as part of the total system of criminal justice is frequently overlooked in the tendency of many associated with the court, its development, and its advanced rehabilitative philosophy to view the tribunal, in delinquency proceedings, as something apart from our criminal law and criminal enforcement apparatus.

> Experience has proven that rather than being a departure from the criminal law, the juvenile court has in effect served as a frontier of the criminal law. Its pioneer work in the development of probation, diagnostic and clinical services, and treatment programs has become today's correctional orthodoxy, finding increasing recognition and acceptance in the field of adult as well as youth corrections. Its integration of behavioral science expertise with the traditional regulatory role of the law has taught us much and periodic reassessment, as evidenced by current emphasis on procedural fairness and regularity, has helped in this process to preserve both balance and the essential values of our judicial system.

Skoler, *What You Should Know About . . . Juvenile Courts and Young Lawyers,* 10 STUDENT LAWYER J., Dec. 1965, at 5, 25.

that he may be committed to a state institution.[17]

and second,

> [t]he probation officer cannot act as counsel for the child. His role in the adjudicatory hearing, by statute and in fact, is as arresting officer and witness against the child. Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by decisions of this Court. A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him." Just as in *Kent v. United States, supra,* at 561-562, we indicated our agreement with the United States Court of Appeals for the Ditsrict of Columbia Circuit that the assistance of counsel is essential for purposes of waiver proceedings, so we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.[18]

THE SCOPE OF RIGHT TO COUNSEL

Criminal Offenses

Juvenile court laws generally make no distinction between felony and misdemeanor offenses. They deal with the status of delinquency and virtually any criminal infraction is sufficient to permit a finding of delinquency capable of calling forth the complete range of sanctions and treatment alternatives available for correction and redirection of delinquent children.[19] Thus under most juvenile court laws as now constituted,

17. 387 U.S. 1, 13 (1967) (footnotes omitted).
18. 387 U.S. 1, 36-37 (1967) (footnotes omitted).
19. Industrial or training schools are generally the "maximum security" institutions of the juvenile correctional world. They exist in every state and may be contrasted with work camps and residential homes which represent intermediate or minimum security settings for juvenile offenders. Some juvenile court statutes, however, authorize direct commitment of adjudicated delinquents to adult facilities, *e.g.,* KAN. GEN. STAT. ANN. § 38-826(5) (Supp. 1965) (option of direct commitment for delinquent over 16 to state industrial reformatory); N.Y. FAMILY CT. ACT § 758(b) (McKinney 1963) (commitment to adult facility for specified serious felonies).

no operative distinctions exist between grades or classifications of criminal conduct for purposes of fourteenth amendment right-to-counsel guarantees.[20]

Non-Criminal Conduct

It is estimated that as many as twenty-five percent of the nation's judicially handled delinquency cases are based on jurisdictional norms applicable only to children, *i.e.*, not constituting criminal offenses.[21] These include such violations as truancy, incorrigible or ungovernable conduct, curfew violation, and endangering health or morals. Since under most juvenile court acts the institutional "maximum" can be meted out by the judge for any of the non-criminal behaviors justifying a delinquency finding, it is difficult to see, under the Court's reasoning and "institutional commitment" test, how any difference in right to representation might be rationalized from the distinction between misdemeanor and non-criminal conduct as a basis for delinquency adjudications. Thus, the peculiar dispositional apparatus of the juvenile court, growing largely out of the demands of its "individualized treatment" rationale, has operated to extend to juveniles in one all encompassing step possibly the broadest range of right-to-counsel protection now afforded in any of our criminal tribunals.

It should be noted that in a few states, a special status distinct from "delinquency" has been created for children engaged in proscribed non-criminal conduct.[22] The significance of this special classification for present purposes is that it permits a more limited range of dispositional handling, usually precluding confinement in state juvenile institutions. Thus, in New York, a child (boy less than sixteen and girl less than eighteen) who is habitually truant or incorrigible or beyond parental authority but has committed no criminal offense may be adjudicated only

20. While many juvenile court acts separately list felony and misdemeanor offenses in defining jurisdiction, none seem to preclude the possibility of institutionalization for even petty misdemeanors. Until recent post-*Gault* amendments, the California act provided a mandatory right to counsel in felony cases but only a discretionary one for misdemeanors and non-criminal conduct. CAL. WELF. & INST'NS CODE § 634 (West 1967). It is interesting to note that the first "across-the-board" guarantee of right-to-counsel protection in misdemeanor cases should arise not in adult tribunals, where the Supreme Court has seemed hesitant to make a definitive determination [Winters v. Beck, 385 U.S. 907 (1966) and DeJoseph v. Connecticut, 385 U.S. 982 (1966) *denying cert.* on question of right to counsel in misdemeanor cases)], but rather for the countless number of petty offenses processed by juvenile courts.

21. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC. & WELF., JUVENILE COURT STATISTICS—1965 10 (1966) (sample of 19 courts serving largest cities in United States indicated 25.5% of judicially handled referrals were for non-criminal offenses applicable only to children).

22. CAL. WELF. & INST'NS CODE § 601 (West 1966); ILL. ANN. STAT. ch. 37, § 702-3 (Smith-Hurd Supp. 1967); KAN. GEN. STAT. ANN. § 38-802(d) (1965); N.Y. FAMILY CT. ACT § 754 (McKinney 1963).

as a "person in need of supervision." Such youths may be placed on probation, in custody of non-parental guardians or welfare agencies, or in youth facilities for disturbed or neglected children but, in the original enactment of the current Family Court Act, could not be committed to state institutions maintained for delinquents or youthful offenders.[23] Similarly, in Kansas, a child who is "habitually disobedient" or has deserted his home without good cause, or whose behavior is "injurious to his welfare" may be placed under juvenile court jurisdiction only as a "wayward child."[24] In such cases, no authority exists to commit the child to the state industrial school for boys or the state reformatory.[25] In such jurisdictions, then, the outer limits of *Gault* may have been reached. The implications of this are explored in the following discussion of potential penalty as the prime determinant of representation rights.

Penalty as Determinative of Scope of Right

In delineating the scope of its decision and making its explicit holding on right to counsel, the Supreme Court made it clear that it was talking about delinquency proceedings "which may result in commitment to an institution in which the child's freedom is curtailed."[26] However, sooner or later, consideration must be given to whether or not other dispositional alternatives represent such substantial curtailments of personal liberty as to warrant the same procedural protections required by possible commitment to a state training school.[27] It is difficult to see where the line can safely be drawn in dealing with any substantial supervision or treat-

23. N.Y. FAMILY CT. ACT § 754 (McKinney 1963). Shortly after the new Act became effective in Sept. 1962, it was amended in April 1963 to permit persons in need of supervision to be placed in state training schools for delinquents. This was an emergency measure which has been extended from year to year up to the present. N.Y. FAMILY CT. ACT § 756(d) (McKinney Supp. 1967). These persons may not, however, be committed to reformatories as is authorized for older delinquents. Anonymous v. People, 14 N.Y.2d 905, 200 N.E.2d 857, 252 N.Y.S.2d 313, *aff'g* 20 App. Div. 2d 395, 247 N.Y.S.2d 323 (1964).

24. KAN. GEN. STAT. ANN. § 38-802(d) (1965).

25. KAN. GEN. STAT. ANN. § 38-826(b) (1965).

26. 387 U.S. 1, 41 (1967). In the Court's general pronouncement on the scope of its holdings, it made the same point but referred to commitment to a "state institution" reather than to "an institution." 387 U.S. 1, 13 (1967).

27. *E.g.*, extended probation coupled with restraints on the child's freedom of association, movement, and conduct; placement in foster homes thereby taking the child out of his parental home for indefinite periods; or placement in special non-residential schools or community treatment programs for delinquents.

Much has been written concerning the stigma attaching even to such adjudications. See, *e.g.*, Wheeler, Cottrell, & Romasco, *Juvenile Delinquency, Its Prevention and Control*, in PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 409, 417 (1967); Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 799-801 (1966).

ment program imposed by a juvenile court.[28]

It may be that, in limiting its holding to dispositional situations leading to institutional commitment, the court was leaving a way out for jurisdictions so committed to an informal, non-adversary orientation in dealing with juvenile offenders as might wish to retain flexibility even in the matter of appointment of counsel. That is, by adjusting its juvenile court laws or procedures to preclude the possibility of institutionalization in the vast majority of cases for which such dispositions are never intended (primarily first offense and minor offense proceedings), the jurisdiction might continue to exclude counsel, at least in indigency situations, to the degree it felt most conducive to effective court operation. One state has already moved in this direction via amended rules of court.[29]

Even assuming the validity of this approach, difficult questions are presented. Are, for example, all institutional commitments objectionable? Is an open forestry camp different in this respect from an intermediate security "training school?" Is involuntary placement in a state operated facility for psychologically and socially maladjusted children to be regarded as different from commitment to an institution maintained exclusively for delinquent offenders? Does a local facility enjoy different status under *Gault* than a state institution? The New York (prior to 1963) and Kansas statutes previously cited permit some institutional commitments of juveniles adjudicated as "persons in need of supervision" or "wayward children." In New York, a commitment could be made to a "facility of the division for youth" or an institution maintained by the Commissioner of Public Welfare and, in Kansas, commitment can be made to a "detention home, parental home, or farm."[30] The new Illinois Juvenile Court Act has created a "minor in need of supervision" classification for the non-criminal conduct prohibitions (habitual truancy and beyond control of parents) but wards so adjudicated may be placed in a variety

28. Courts have already begun to deal with similar issues. *See* Madera v. Board of Educ., 386 F.2d 778 (2d Cir.), *rev'g* 267 F. Supp. 356 (S.D.N.Y. 1967), where a federal district court saw a prohibited curtailment of personal liberty in special school placements for problem children but was reversed on the preliminary posture of the school system proceeding in which it sought to require representation by counsel; *In re* Goldwyn, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967) (finding a right to hearing with counsel on impairment of educational system rights of a student accused of misconduct).

29. Under N.J. Ct. R. 6:3-4(c), 6:9(c)-(d), as amended in 1967, an "informal calendar" has been authorized to which the juvenile court judge may assign all cases which, in his opinion, will not result in institutional commitment of the juvenile. Cases, when so listed, may be conducted in "summary manner" (including processing by a lay "conference committee" system which has been operative for several years in the state) and may result in any disposition *except commitment.*

30. *See* KAN. GEN. STAT. ANN. § 38-826(b) (1965); N.Y. FAMILY CT. ACT §§ 754(c), 756(a) (McKinney 1963).

of protective, youth-caring, and local delinquency treatment facilities separate from the official state institutions, *i.e.*, those maintained by the Illinois Youth Commission.[31] In California, a juvenile charged with habitual refusal to obey parents, for truancy, or because in "danger of leading an idle, dissolute or immoral life" may not be committed to the Youth Authority, the authorized control point for institutional commitment. He may, however, be committed to a county juvenile home, ranch, camp, or forestry camp.[32] It may well be, indeed it seems likely, that these "two-track" institutional arrangements will not succeed in avoiding the requirements of *Gault* and that only devices like New Jersey's post-*Gault* "informal calendar" classification which flatly prohibits commitment of any kind can hope to succeed in reestablishing a discretionary basis for assignment of counsel to indigent juveniles.[33]

Stage of Proceeding-After Arrest

The disclaimers in *Gault* leave the matter of right to counsel at the post-arrest and pre-judicial stage open to constitutional definition. However, the majority opinion lays a strong foundation, in language, reasoning, and recognition of the operative facts of the juvenile process, for application of *Miranda v. Arizona*,[34] and *Escobedo v. Illinois*[35] to the apprehended juvenile. For example, the Court, in determining the applicability to juveniles of the privilege against self-incrimination, recognized the guarantee's pre-judicial scope:

> [w]e conclude that the constitutional privilege against self-incrimination is applicable to juveniles. . . . The participation of counsel will, of course, assist the police, juvenile courts and appellate tribunals in administering the privilege. . . .[36]

as well as the hazards to juveniles at the pre-judicial stage of future exposure to criminal sanctions either through institutional commitment in juvenile proceedings or direct processing by adult courts:

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31. ILL. ANN. STAT. ch. 3,7 §§ 705-2(b), 705-7 (Smith-Hurd Supp. 1967).

33. N.J. CT. R. 6:3-4(c), 6:9(c)-(d). An important motivation in promulgating the amended juvenile court rules may have been a desire to preserve the informality of the quasi-judicial "juvenile conference committee system" operative in the state in which groups of youth-serving professionals (lawyers, police, court staff) have handled minor cases (on voluntary agreement by the child and parents), formulating agreed dispositions involving neither institutionalization nor adjudication of delinquency. Rubin, *Volunteers Serve the Court*, 15 JUV. CT. JUDGES J. 19 (1964). In the *Gault* opinion, the Supreme Court undertook to disclaim any applicability of the holding to pre-judicial conference and treatment procedures falling short of adjudication such as are involved in New Jersey conference committees and in several recommendations of the President's Crime Commission (*e.g.*, recommendations as to preliminary conference and consent decree dispositions). 387 U.S. 1, 31 n.48 (1967).

34. 384 U.S. 436 (1966).

35. 378 U.S. 478 (1964).

36. 387 U.S. 1, 55 (1967.

> [i]n addition, apart from the equivalence . . . of exposure to commitment as a juvenile delinquent and exposure to imprisonment as an adult offender, the fact of the matter is that there is little or no assurance in Arizona, as in most if not all states, that a juvenile apprehended or interrogated by the police or even by the juvenile court itself will remain outside of the reach of adult courts. . . . In Arizona, as in other states, provision is made for juvenile courts to relinquish or waive jurisdiction to the ordinary criminal courts.[37]

It is difficult to reconcile the foregoing, coupled with the Court's conviction as to the ascendant importance of counsel in implementation of all procedural rights and the peculiar vulnerability of children to improper influence, suggestion, and fantasy,[38] with any doctrine which exonerates police from advising juveniles of right to counsel and providing counsel when desired at pre-judicial stages. The President's Crime Commission reports, relied upon heavily by the Court, emphasized the important screening role played by the police[39] and the fact that arrest records, as much as court adjudications, lead to "labelling" and other disabilities generally accorded "delinquents."[40]

Although the point is not explicitly made by the Court, these "facts of life" concerning police handling of juveniles would seem doubly difficult to reconcile with any constitutional argument that counsel was not, after all, as important to the child in custody as to the adult in custody.[41]

Stage of Proceeding-Detention and Intake

Detention and intake are important pre-judicial stages of the juvenile

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37. *Id.* at 50.

38. *Id.* at 52-56. There the Court cites *In re* Four Youths, Nos. 28-776-J, 28-778-J, 28-783-J, 28-859-J (D.C. Juv. Ct., Apr. 7, 1961) (Judge Ketcham's opinion discounting the trustworthiness of oral confessions of children in police custody); *In re* Carlo & Stasilowicz, 48 N.J. 224, A.2d 110 (1966); *In re* Gregory W. & Gerald S., 19 N.Y.2d 55, 224 N.E.2d 102, 277 N.Y.S.2d 675 (1966).

39. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 82-83 (1967); TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 27, at 12-14, which refers to the national rate of police adjustments of juvenile contacts (*i.e.*, without court referral) of forty-five to fifty percent. *See also* Note, 79 HARV. L. REV., *supra* note 27.

40. TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 27, at 39. A few statutes, like N.Y. FAMILY CT. ACT § 784 (McKinney 1963), apply confidentiality of records strictures to police as well as court records.

The quasi-judicial hearing procedures conducted by many police agencies to aid their determination to refer or release have also been criticized. Note, 79 HARV. L. REV., *supra* note 27, at 779-81.

41. For a recent appellate case extending *Gault* to police custody and confirming the application of *Miranda* to juveniles, see *In re* William L., ——App. Div. 2d ——, 287 N.Y.S.2d 218 (1968).

justice system. Detention exposes the child to pre-adjudication confinement, usually on the basis of standards relating to community safety, the child's welfare, or the child's availability for tiral.[42] Recent legislation exhibits a trend toward court hearings for detention decisions, at least as a follow-up to the initial detention decision by law enforcement officials or court detention staff.[43]

It may be that the impairment of liberty occasioned by pre-hearing detention of juveniles falls below the threshold of substantiality necessary to invoke the mandatory right to counsel recognized in *Gault*. Certainly, two weeks of pre-hearing detention is not as serious as the five years of pre-majority confinement which confronted Gerald Gault at the Arizona State Training School. But pre-hearing detention has been viewed as particularly deleterious to juveniles, especially where the only facilities are adult jail facilities.[44] Detention, moreover, is often a form of "intake" and, as such, may provide additional grounds for urging the necessity of counsel.

Intake is a special juvenile court term. It refers to the initial screening stage at which a decision is made concerning what action will be taken on cases referred to juvenile courts; the options usually are "adjustment" (closing the case without adjudication) or the filing of a petition leading to a formal hearing.[45] It is truly a "critical stage" for the juvenile because it determines whether an official record of delinquency adjudication will become part of his dossier. If the child or his attoreny achieves success at this stage, no petition is filed, no hearing is held, and the stigma of adjudicated delinquency is avoided.

An intake referral for petition and court hearing does not, itself, institutionalize the child which, under *Gault*, would require access to

42. In the juvenile court system, detention is generally under court control and not accompanied by the right to bail. NATIONAL COUNCIL OF JUVENILE COURT JUDGES, JUVENILE COURT JUDGES DIRECTORY AND MANUAL 339-46 (State Systems Chart III) (1964) (indicating only six states with right to bail in juvenile proceedings and twelve states where admission to bail is discretionary). *See also* D. FREED & P. WALD, BAIL IN THE UNITED STATES—1964 93 (1964).

43. *See, e.g.*, CAL. WELF. & INST'NS CODE § 135 (West 1966); ILL. ANN. STAT. ch. 37, § 701-2 (Smith-Hurd Supp. 1967).

44. It is estimated that for ninety-three percent of the country's juvenile court jurisdictions, serving 44.3 percent of the population, there is no place for detention other than the local jail. TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 27 at 37. Recent amendments to the California statute specifically provide for appointed counsel at detention hearings. CAL. WELF. INST'NS CODE § 634 (West 1966).

45. Rosenheim & Skoler, *The Lawyer's Role at Intake and Detention Stages of Juvenile Court Proceedings*, 11 CRIME & DELINQUENCY 167 (1965); Sheridan, *Juvenile Court Intake*, 2 J. FAMILY L. 139 (1962). Intake adjustments have rather constantly accounted for disposition of about half of all cases referred to juvenile courts. *See, e.g.*, JUVENILE COURT STATISTICS—1965, *supra* note 21. Rates vary sharply in individual jurisdictions. For adult derivatives, see Miller & Remington, *Procedures before Trial*, ANNALS Jan. 1962, at 111.

counsel. However, this step has been thought serious enough to call forth the "guiding hand" for adults.[46] Any distinction in the treatment of children would need to be rooted in the mystique of the intake process, *i.e.*, whether with family and without counsel, more assistance can be provided to children passing through intake due to increased flexibility than would be possible were counsel present to force the issue of court referral. In this regard, it is interesting to note that prevailing standards of good court practice suggest a formal proceeding when, at intake, the child refuses normal cooperation or questions the existence of a prima facie case, *i.e.*, fails to concede his involvement.[47]

It may well be that the desired openness of the intake interview can be maintained with counsel present at least where, as under some statutes, admissions made by the juvenile may not be used at the hearing,[48] and where the intake staff can rely on some form of legal advice to cope with defense counsel's contentions of a technical nature. On the other hand, mere exclusion of intake statements as evidence at the hearing would seem inadequate to obviate the need for counsel since the critical determination of whether to close the case by adjustment or to proceed to adjudication still remains a part of the process. Balancing such considerations, the case seems strong for extending of *Gault* to this important procedural stage.

Pre-Trial Preparation and the Adjudication

Right to counsel at the adjudication stage necessarily includes the right to have counsel appointed sufficiently in advance of the hearing to allow for adequate pre-trial preparation. The Court has made clear that assistance of counsel at a critical stage of proceedings, such as the adjudication hearing or the waiver hearing, means "effective assistance of counsel."[49] Thus where appointment takes place at the commencement of the hearing, it is obvious that a reasonable opportunity to prepare could not be denied. In juvenile courts which conduct initial hearings in the nature of arraignments after the filing of a petition but before the hearing on the merits, effective assistance of counsel would also seem critical and the adult analogy applicable.[50]

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46. White v. Maryland, 373 U.S. 59 (1963) (right to counsel at preliminary examination).

47. NATIONAL COUNCIL ON CRIME AND DELINQUENCY & NATIONAL COUNCIL OF JUVENILE COURT JUDGES, GUIDES FOR JUVENILE COURT JUDGES 39 (1963) (criteria for intake selection of cases to be handled judicially).

48. N.Y. FAMILY CT. ACT § 735 (McKinney 1963) (statements made at preliminary conferences); ILL. ANN. STAT. ch. 37, §703-8(5) (Smith-Hurd Supp. 1967).

49. *In re* Gault, 387 U.S. 1, 36 (1967); Kent v. United States, 383 U.S. 541, 554 (1966).

50. See discussion of representation at initial hearing in Dorsen & Reznick, *In re Gault and the Future of Juvenile Law*, FAM. L. Q., Dec. 1967, at 1, 17.

The Disposition Stage

"Disposition" refers to the juvenile court's action in prescribing appropriate penalties or treatment for an adjudicated delinquent. In most jurisdictions, it represents the final stage of the juvenile court "trial," but in a significant number, due to the recent revisions of many juvenile court acts, it must be conducted as a separate hearing following the adjudication hearing.[51]

Disposition is normally based on an intensive probation study or "social history" prepared by the court probation or social service staff; it is considered by many to be the most significant stage of the juvenile court hearing process. It is frequently cited as a major example of divergence from adult procedures in its acute focus upon the child's needs, background, and personality and upon an appropriate corrective plan for the delinquent youngster.[52]

Does the juvenile offender have a constitutionally protected right to counsel at the disposition stage? Due process for adults appears to require representation by counsel in sentencing proceedings, at least where a danger exists that untrue assumptions about the offender's record, rehabilitation potential, etc., will affect or be considered in the sentencing decision.[53] Since the majority of juvenile delinquency hearings involve pleas of guilty, it is clear that for most adjudicated delinquents, the disposition decision may be the most critical stage of all and thus the one most urgently requiring an advocate for the child.

Appeal and Collateral Attack

The *Gault* opinion is silent on the right to counsel in appeals from juvenile court determinations. Indeed, it declined to deal with Gault's contention that Arizona procedure denied a constitutionally protected right to appellate review and a transcript of proceedings.[54] The Court noted prior holdings that states were not constitutionally required to provide appellate courts or an opportuntiy for appellate review[55] but expressed concern with the burdens imposed upon habeas corpus machinery

51. ILL. ANN. STAT. ch. 37, §§ 701.10, 705-1 (Smith-Hurd Supp. 1967); N.Y. FAMILY CT. ACT §§ 742, 746 (McKinney 1963) (both statutes permit hearings to be held consecutively without any time interval between them). See the general recommendation of the National Crime Commission that separate adjudication and disposition hearings be adopted by all juvenile courts. CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 39, at 87.

52. *See* GUIDES FOR JUVENILE COURT JUDGES, *supra* note 47, at 68-88; P. TAPPAN, JUVENILE DELINQUENCY 251-86 (1949).

53. Townsend v. Burke, 334 U.S. 736 (1948). *Cf.* United States v. Behrens, 375 U.S. 162 (1963) (error for court to fix final sentence "in the absence of respondent and his counsel"); Annot., 20 A.L.R.2d 1240 (1951).

54. 387 U.S. 1, 58 (1967).

55. *Id.* The Court cites Griffin v. Illinois, 351 U.S. 12, 18 (1956).

by lack of such rights. In the context of right to counsel, however, the question is whether, given the right to appellate review under the state law, local courts may safely ignore the mandate of *Gault* and decline to afford representation for this purpose. It is difficult to see how they could do so.[56] The constitutional right to counsel on appeal, firmly established in adult proceedings,[57] is rooted conceptually in the important nature of the appeal and, as to indigent defendants,in"equal protection" status. The Court, despite its *Kent v. United States*[58] and *Gault* disclaimers, appears to have served ample warning that it will not stint in measuring the right to counsel against the important incidents of juvenile court procedure: "[t]he right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice."[59] Collateral attack should stand on no different ground.

Parole and Probation Revocation

In a recent case, the Supreme Court has extended the *Gideon* rule to probation revocation hearings.[60] The need for counsel at this stage, judged by the substantiality of the penalty faced in such proceedings, was well developed in the opinion and would seem equally applicable in juvenile cases absent some superior capacity for equity and accuracy on the part of juvenile parole and probation authorities not possessed by adult authorities.

In some jurisdictions, both parole and probation revocation are in the hands of youth authorities or other administrative agencies, or are handled by a non-judicial court staff. The *Gault* representation mandate would seem here to call for counsel in whatever decisional process is operative, and, in addition, may require formal hearing rights not previously recognized in such administrative proceedings to insure effective representation by counsel.

Transfer to Adult Courts[61]

The juvenile court laws of most states are structured so that

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56. One not uncommon form of appeal from juvenile court adjudications is the trial de novo in a court of general jurisdiction. This is usually found where juvenile court jurisdiction is lodged in minor courts and thus made subject to review in the manner of other minor cases. Applicability of *Gault* rights in this kind of procedure seems clear and direct. *See* B. GEORGE, GAULT AND THE JUVENILE COURT REVOLUTION 50 (1968).

57. Swenson v. Bosler, 386 U.S. 258 (1967); Douglas v. California, 372 U.S. 353 (1963).

58. 383 U.S. 541 (1966).

59. *Id.* at 561.

60. Mempa v. Rhay, 389 U.S. 128 (1967) (involving two cases under local procedure which permitted imposition of deferred sentences upon violation of conditions of probation).

61. See Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583 (1968).

juvenile offenders who commit serious crimes or who are not deemed fit subjects for juvenile court processing may be tries in regular criminal courts. Provision is made for this in a variety of ways. In some states, certain major crimes are expressly excluded from juvenile court jurisdiction.[62] In other states, the judge is given discretion, subject to certain limitations,[63] to "waive" jurisdiction or "transfer" cases for trial in adult courts and, in a few states, this function is placed solely in the hands of the prosecutor or the criminal court.[64]

In *Kent v. United States,*[65] the Supreme Court considered procedural rights in waiver proceedings and determined that the outcome of the proceeding was of such critical importance to the child as to require a full measure of basic procedural protection—the right to a hearing, to representation by counsel, and to judicial specification of the basis of any transfer order. *Kent,* however, was decided on the basis of the District of Columbia Juvenile Court Act[66] and prior interpretative case law. Thus the question of the constitutional right to counsel in waiver proceedings, prior to *Gault,* might have been considered unresolved despite declarations in the *Kent* opinion that seemed to belie its statutory rationale:

> . . . there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.[67]

Gault, however, should have dispelled what doubt remained. The opportunity for hearing and representation now seems clearly a due process requirement in a waiver proceeding to subject juveniles to prosecution as an adult.

Waiver of Right to Counsel

One of the greatest uncertainties remaining in the wake of *Gault* is

62. *E.g.,* DEL. CODE ANN. tit. 10, §§ 957, 1159 (1953) ("capital felony"); KY. REV. STAT. § 208.170(1) (1962) ("murder or rape"); LA. REV. STAT. ANN. § 13:1570 A(5) (1968) ("capital crime" and "attempted aggravated rape"); MISS. CODE ANN. § 7185-15 (1953) (offense "punishable by life imprisonment or death").

63. These limitations are usually based upon a minimum age or the seriousness of the offense charged.

64. For a complete listing of the various "transfer" provisions, see JUVENILE COURT JUDGES DIRECTORY AND MANUAL, *supra* note 42, at 206-37 (State Systems Chart II).

65. 383 U.S. 541 (1966).

66. D.C. CODE ANN. §§ 11-1501 to -1589 (Supp. V, 1966).

67. Kent v. United States, 383 U.S. 541, 554 (1966). States have split on whether Kent v. U.S. imposes a constitutional right to counsel in transfer or waiver hearings. For cases applying the right, see Summers v. State, 230 N.E.2d 320 (Ind. 1967); Knott v. Langlois, 231 A.2d 767 (R.I. 1967); State v. Yoss, 225 N.E.2d 275 (Ohio 1967); *Contra* State v. Hance 233 A.2d 326 (Md. 1967); State v. Acuna, 428 P.2d 658 (1967).

whether a juvenile defendant's right to counsel may be waived and, if so, what constitutes a valid waiver.[68] In determining that mere knowledge that a lawyer could have been retained did not constitute a waiver by Gerald Gault or his mother of their right to counsel, the majority opinion suggested that waiver was possible under proper circumstances:

> [t]hey had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel unless they chose waiver.[69]

Given the possibility of a valid waiver[70] there would seem to be wisdom in requiring more stringent standards for its effective exercise than in the case of adult defendants. Such standards, in addition to mandatory explanations of the right and emphasis on its careful consideration, could go beyond adult treatment in important ways. For example, courts might insist that both the child and parents agree to the waiver and if either refused there could be no effective waiver.[70] This would be an easily measurable standard and would afford recognition to the special vulnerability and protective needs of the juvenile defendant. Similarly, it might be determined that no waiver was possible where the child's interests in the proceeding were opposed to those of the guardian or parent, *e.g.*, a family-directed offense or charge initiated by a parent.

There is no reason why due process for juveniles need only equal and not go beyond that accorded adults. Indeed, proponents of the juvenile court system have often been insistent in claiming the necessity of special care beyond that accorded adults[71] and this position, where soundly based in the realities of juvenile disability, might well be extended to procedural rights.

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68. It is interesting that the Court refused to consider the child as inherently incapable of waiving the right to counsel in view of its apparently sympathetic recognition of authority suggesting appointment of counsel as a matter of course in juvenile cases "without requiring any affirmative choice by child or parent" and of its emphasis on the inherently untrustworthy character of juvenile statements and testimony, whether or not voluntary. THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 39, at 86, cited in *In re* Gault, 387 U.S. 1, 38 n.65 (1967).

69. *In re* Gault, 387 U.S. 1, 42 (1967).

70. One recent case has held that *both* the child and the parent must waive. *In re* William L., ———App. Div.2d ———, 287 N.Y.S2d 218 (1968) (*Miranda* warnings given only to child and not mother were defective).

71. *See* Alexander, *Constitutional Rights in Juvenile Court,* in JUSTICE FOR THE CHILD 82, 88 (M. Rosenheim ed. 1962).

The need for stringent standards in waiver proceedings is illustrated by certain reported tendencies of post-*Gault* practice:

> [e]xperience may prove that the Achilles heel of the Gault opinion is the court's failure to set standards for waiver of defined rights. Fragmentary reports from several areas of the country suggest that because of the added administrative burdens involved, some courts are strenuously persuading juveniles not to exercise their newly acquired constitutional guarantees. . . . When the wisdom of a waiver, looked at from the juvenile's point of view, seems dubious, the juvenile court should reject it, appoint counsel and ensure that these rights are exercised.[72]

In New York, a state with perhaps the strongest and most sweeping statutory provision for mandatory notice of right to counsel and appointment of counsel in delinquency cases,[73] representation is apparently waived in more than half of all cases adjudicated outside New York City (where an aggressive appointment program is operative).[74] Failure to make use of available counsel is probably even greater elsewhere, fostered no doubt in large part by the practice among some probation staffs of suggesting to the juvenile that appointment of counsel has no tangible benefit, and may even be a detriment leading to delay or judicial disapproval.[75] The Supreme Court will undoubtedly be called upon to further delineate requirements for waiver of counsel in juvenile proceedings, and its determinations should have a critical effect on the de facto rate of representation in juvenile cases.

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72. Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal,* 53 VA. L. REV. 1700, 1712 (1967). *Cf* Position Statement, *supra* note 11, at 2, which states:

> Far from being weaker than in adult criminal proceedings, the argument in favor of the right to counsel is *stronger* in juvenile proceedings. It has long been accepted that the juvenile lacks the legal competence to take many steps that would bind him if he were an adult . . . . His presumed 'incompetence' in contracts is difficult to reconcile with the notion that when brought into the juvenile court, he has the competence to waive his right to counsel. Counsel is required in juvenile cases even where the child states that he does not want a lawyer to represent him.

73. N.Y. FAMILY CT. ACT. §§ 249, 727, 741 (McKinney 1963).

74. JUDICIAL CONF. OF THE STATE OF NEW YORK, TWELFTH ANNUAL REPORT 289 (1967), showing representation for the judicial year 1965-66 in only 41 percent of delinquency proceedings heard outside New York City (95 percent in New York City).

75. *See, e.g.,* REPORT OF THE PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA 646 (1966), indicating the execution of waiver forms by 85-90 percent of the juveniles and their families appearing at preliminary hearings in the D.C. Juvenile Court. Two States applying *Kent v. U.S.* to transfer and waiver hearings have refused to do so retroactively. Smith v. Commonwealth, 412 S.W. 2d 256 (Kent 1967); *In re* Harris 2 CRIM. L. RPTR. 2245 (Cal. Sup. Ct. 1967).

Retroactivity of Right To Counsel

Gault's most direct antecedent in the right to counsel area, the *Gideon* decision, was applied retroactively[76] and a number of state courts seem to be following a similar course with respect to Gault's requirements.[77] However, courts in at least two states have held otherwise,[78] based on local interpretation of criteria for retroactive application recently enunciated by the Supreme Court in *Stovall v. Denno*.[79]

It is difficult to see retroactive application in *Gault* as critical to either the proper introduction of the new rules on right to counsel or to redress any substantial number of injustices in past adjudications. The juvenile court has, in most states, been a tribunal in which both prosecution and defense were absent. Thus the system was largely adjusted to absence of representation and compensated for it by the roles assumed by the judge and staff. This is not meant to justify the status quo but rather to suggest that the Court's *Stovall v. Denno*[80] standards, which examine the purpose of new constitutional interpretations, past reliance on existing law, and the effect that retroactivity might have on administration of criminal justice, would seem to leave room for local determinations against retroactivity. The fact that *Gault* encompassed more than right to counsel and went into areas where the Supreme Court has not found it necessary to impose retroactivity, *e.g.*, police warnings in regard to self-incrimination, would also seem persuasive to the case for leaving judgments in this area to reasonable local discretion.

IMPACT AND ROLE OF COUNSEL

Three aspects of the institutional influence of the *Gault* representation guarantee will be examined: (1) legal manpower requirements, (2) impact on proceedings and personnel, and (3) the role of counsel for the child.

Manpower Requirements

In admittedly rough projections, the President's Crime Commission estimated that the current amount of legal services required for adequate

76. Arthur v. Colorado, 380 U.S. 250 (1965); Pickelsimer v. Wainwright, 375 U.S. 2 (1963).

77. *In re* Billie, 6 Ariz. App. 65, 429 P.2d 699 (1967); Marsden v. Commonwealth, ——— Mass. ———, 227 N.E.2d. 1 (1967). For a discussion of *Gault* retroactivity, see 1 NATIONAL COUNCIL OF JUVENILE COURT JUDGES, JUVENILE COURT DIGEST, Nov. 1967, at 2-4.

78. Cradle v. Peyton, 208 Va. 243, 156 S.E.2d 874 (1967); Reick v. Hershman, 1 CRIM. L. REP. 2153 (Waukesha County Ct., Wisc., June 1, 1967).

79. 38 U.S. 293 (1967) (participation in police lineup identification without advice of counsel—retroactivity denied).

80. *Id.*

representation of adult defendants in all criminal cases except traffic offenses[81] would be equivalent to the full time annual services of between 8,300 and 12,500 lawyers.[82] No projections were made for representation in delinquency cases. However, following Commission calculations, using the latest Children's Bureau statistics, assuming a yearly representation capacity for the individual lawyer somewhere between the Commission's felony and misdemeanor estimates, *i.e.,* 500 juvenile court cases per year, and conservatively estimating an incidence of indigency offset by waivers which would require assigned counsel or defender representation in fifty percent of all judicially handled delinquency cases, *Gault* might be expected to require the annual equivalent of 700 to 750 years of full time lawyer services in the nation's juvenile courts.[83] This projection, which largely ignores representation in cases not proceeding to the formal petition and hearing stage may be considered conservative, and, of course, the actual number of lawyers needed to provide this level of services would be larger than the lawyer-year estimate, perhaps several times greater.

In a 1954 survey of juvenile court judges serving in the nation's largest cities, it was estimated that lawyers appeared on behalf of children in no more than five to ten percent of the delinquency cases heard in most courts studied.[84] Even assuming an appropriate increase in this ratio in the years intervening between the survey and *Gault,* it appears that *Gault* will quite likely occasion a three to five fold increase in the general incidence of lawyer representation in juvenile courts, the exact amount depending on waiver experience. This represents an unusual impact upon ongoing operations which should produce correlative strains upon workloads, budgets, length of case disposition, and manpower levels of other

81. *I.e.,* felonies, misdemeanors, appeals, collateral attacks and revocation proceedings.

82. TASK FORCE REPORT: THE COURTS, *supra* note 9, at 57. Using this manpower estimate (assuming indigent representation at fifty percent of the total man-year figure and $25,000 per attorney), the report estimated a national budget between $84 and $158 million per year to cover all indigent representation needs. For further analysis of manpower needs, see REPORT OF THE CONFERENCE ON LEGAL MANPOWER NEEDS OF CRIMINAL LAW (1966) in 41 F.R.D. 389, 392-404.

83. The 500 per man-year caseload may seem high, but experience has shown an even greater capacity in defender-type offices serving juvenile courts. The 19-attorney "law guardian" complement from the New York Legal Aid Society which is responsible for all indigent representation in the New York City Family Court handled approximately 13,000 juvenile court cases in 1965 (11,000 involving delinquency or similar charges) for an average load of about 670 cases per year. TWELFTH ANNUAL REPORT, *supra* note 74, at 289.

84. Skoler & Tenney, *Attorney Representation in Juvenile Court,* 4 J. FAMILY L. 77 (1964). *Cf.* Children's Bureau, U.S. Dep't of Health, Educ., & Welf., *Survey of Juvenile Courts and Probation Services in* TASK FORCE REPORT: JUVENILE DELINQUENCY, *supra* note 27, at 82 (Table 16) (confirming estimate of frequency of representation below ten percent in most courts).

court personnel. Quantification of such impact is virtually impossible without further experience or without the application to specific court systems of involved simulation and modelling techniques.[85] The calculations, while only approximations, have been made to illustrate the degree of institutional change which the *Gault* mandate can be expected to bring to the juvenile court in the next few years.

Impact on Proceedings and Personnel

Perhaps the most immediate effect of the new right to counsel will be to increase the stresses upon what has historically been for most jurisdictions a court without prosecutors.[86] Evidence of the imbalance created by the presence of counsel for the accused with no attorney representing the state has already been obtained in experience under the New York law guardian system, particularly in New York City where juveniles are now represented by counsel in over ninety-five percent of petitioned cases.[87] The dilemma is a real one:

> [l]aw Guardians have been provided to defend the rights of children, and appropriations for their cost are made in budget of each appellate Division. . . . No similar provision is made for the presentation of cases alleging delinquency.
>
> As a result of this situation, the Court is all too often required to question complaining witnesses on the basis of the petition and then have the Law Guardians exercise the right and duty of cross examination. Such a procedure does not provide for adequate preparation or presentation of the testimony against the child. It also places the Court in the untenable position of having to seek the facts on which a petition of delinquency is based, hear the defense, and then undertake to evaluate and pass on the evidence as a judge.[88]

Adjustments have already been made by regular assignment of New York City Police Department and Board of Education counsel to present at least the more important cases. In Connecticut, to meet similar needs, a system of "court advocates" has been established to present delinquency cases for the state. However, almost all juvenile court judges have, at some time, felt an uncomfortable pull toward the state's

85. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY 39-44, Appendix I (1967); Taylor & Navarro, *An Application of Systems Analysis to Aid in the Efficient Administration of Justice*, 51 J. AM. JUD. SOC'Y 47 (1967).

86. Skoler & Tenney, *supra* note 84, at 83-84 (regular representation of state in delinquency proceedings in less than fifteen percent of courts surveyed).

87. TWELFTH ANNUAL REPORT, *supra* note 74, at 289.

88. *In re* Land, 44 Misc. 2d 900, 904, 255 N.Y.S.2d 987, 991 (1965).

position when defense counsel has elicited a one-sided development of the facts with no one to intervene but the judge. Thus, full realization of the values of adversary representation may require an advocate for the state to assure both proper presentation of cases and a judiciary free of advocate responsibilities.

The impact of *Gault* on the role and behavior of court probation or social service staff is also likely to be substantial. Traditionally viewed as impartial investigators, diagnosticians, and court advisors, probation personnel may find themselves more in the position of advocates for the state's interests and less for the child's welfare, at least to the extent that these appear to conflict. This no doubt will be an unwanted posture at odds with professional inclination and training. It will not, of course, extend to the social casework and treatment efforts of such professionals once disposition has been made. Nevertheless, in the disposition decision process, it is a position which may freqently be impelled, and has already been felt,[89] as lawyers provide the sophistication and articulation necessary to make effective challenges to the social histories, diagnostic findings, and corrective plans developed by probation staff. The sometimes uncomfortable presence of counsel should also enhance the accuracy, documentation, and responsibility of probation staff work, hopefully without impairing the basic social work orientation, valuable skills, and concern contributed by such personnel to the juvenile court process.[90]

It has been suggested that any significant increase in juvenile representation will further congest already overloaded court dockets because additional time will be required to process cases where evidence, disposition data, and recommendations are subject to scrutiny of counsel. This indeed appears to be the case but not in the degree feared by some.[91] Moreover, the more deliberate pace imposed by adversary proceedings may have a salutory countereffect. Courts, like administrative agencies, tend to adjust to their capacities. That is, if only a given number of cases can be handled under the rules and resources of a particular system,

89. Paulsen, *The Expanding Horizons of Legal Services*—II, 67 W. VA. L. REV. 267, 270, 275 (1965) (discussion of friction experienced between New York law guardians and probation staff in disposition hearings).

90. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC., & WELF., STANDARDS FOR JUVENILE AND FAMILY COURT 106-110 (discussion of probation staff). For an interesting study of the different values and working styles characteristic of the professions at work in juvenile courts (judges and lawyers, social workers, police), see Walther & McCune, *Juvenile Court Judges in the U.S.—Working Styles and Characteristics,* 11 CRIME & DELINQUENCY 384 (1964).

91. Judges of the New York City Family Court (there are now 34), operating with lawyers present in almost all delinquency cases, maintain annual disposition rates comparing favorably with full-time family court judges elsewhere in the state where representation rates are much lower, and with juvenile court judges in states where representation is infrequent.

administration moves toward limiting intake so that only such number will be accommodated. Being compelled by *Gault* to handle a smaller volume of hearings with greater selectivity should require more widespread resort to informal disposition techniques, an area offering perhaps the best potential for early diversion of career patterns of law violation, the voluntary acceptance of help by problem adolescents, and avoidance of the harmful effect of a delinquency label.[92]

Role of Counsel

The attorney in juvenile court can, as with representation of adults in criminal cases, play an active and constructive role at virtually all stages of proceedings. As outlined in a recent treatise:

> 1. At the pre-hearing stage, he can represent the child and his family at intake interviews, to help clarify whether jurisdictional requisites are met and there is sufficient evidence (*i.e.*, a prima facie case) to warrant the filing of a formal petition. He can also present the family's position in detention hearings and determinations and explore possibilities of informal adjustment of the case, and the conditions thereof, without the necessity of formal petition and hearing.
> 2. At adjudication, he can insure observance of the child's and family's legal rights, present evidence and cross-examine witnesses, make objections to improper evidence and testimony, and see that the child's position is fully presented.
> 3. In disposition, the lawyer can present evidence bearing on the treatment decision, question facts developed in social reports, and serve as spokesman in presenting the child's and family's view of a proper disposition and any alternative plans they may wish to present for court consideration.
> 4. In post-hearing stages, the attorney can pursue appeals from any determinations deemed erroneous, represent the child in probation revocation proceedings or proceedings to change the terms of probation or otherwise alter the court's prior dispositions.[93]

92. Reference to the findings and recommendations of the President's Crime Commission reveals heavy reliance on pre-judicial handling and treatment for effective inroads on juvenile crime, *e.g.*, major recommendations for establishment of youth services bureaus, enlarged use of preliminary conferences, and employment of consent decrees to dispose of juvenile cases short of adjudication. THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 39, at 83-84.

93. STANDARDS FOR JUVENILE AND FAMILY COURTS, *supra* note 90, at 113. For a valuable compilation of writings exploring the role, function, and significance of lawyer

None of these roles would seem unfamiliar to the attorney engaged in criminal practice and yet, as juvenile courts have operated in most jurisdictions,[94] much of the process might appear alien to attorneys making initial contact with the court. *Gault,* in its guarantees of notice, confrontation, the privilege against self-incrimination, and right to counsel will, if anything, render juvenile court procedure more understandable to such practitioners.

It has been suggested, however, that juvenile court representation, consistent with the court's special concerns for the best interests and redirection of children, involves more than journeyman representation of adult defendants. This has long been the view of those associated with the juvenile court movement[95] and has been expressed in recent literature in terms of a somewhat complex "advocate-guardian-officer of the court" mission[96] or, more functionally, a responsibility for supplementing counsel's historical role as a developer of facts, protector of client rights, and advocate against the state's contentions with new duties.[97] Perhaps the greater dilemma presented by such role enlargements is the extent to which they should temper the lawyer's traditional duty "to present every defense that the law of the land permits" or, more simply, to win his case or help secure the lightest possible penalty or sanctions for his client's wrongdoing.[98]

In the traditional notion of the juvenile court as a substitute parent seeking to provide the juvenile with the "treatment" necessary to secure his correction and fullest development, a lawyer who entered the process

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representation in juvenile courts, see INSTITUTE OF CONTINUING LEGAL EDUCATION, CHILDREN IN THE COURTS—THE QUESTION OF REPRESENTATION (Shapiro & Newman ed. 1967).

94. *E.g.,* a considerable measure of informality, the absence of prosecutors, intake and "plea bargaining" discretion in the court itself, and a close and vital interdependence between judges and probation staff in both adjudication and disposition.

95. *See, e.g.,* Alexander, *supra* note 71; Molloy, *Juvenile Court: A Labyrinth of Confusion for the Laywer,* 4 ARIZ. L. REV. 1 (1962). A comprehensive research and demonstration project seeking to test and examine assumptions and roles in juvenile court representation is now being conducted by the National Council of Juvenile Court Judges under a Ford Foundation grant. See LEFSTEIN & STAPLETON, COUNSEL IN JUVENILE COURTS: AN EXPERIMENTATAL STUDY (mono. 1967).

96. Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court,* 12 BUFF. L. REV. 501 (1963); Schinitsky, *The Role of the Lawyer in Children's Court,* 17 RECORD OF N.Y.C.B.A. 10 (1962).

97. The latter concept would give prominence to such responsibilities as interpretation of the court's approach and goals to juvenile offenders and their parents, and securing their cooperation in the court's disposition. Skoler & Tenney, *supra* note 84, at 91-93.

98. *See* Lefstein, *In re Gault, Juvenile Courts and Lawyers,* 53 A.B.A.J. 811, 812-813 (1967) (discussion of dilemmas presented in juvenile court representation in regard to philosophy of court vs. canons of legal ethics). *In re* Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966), included a complaint that the juveniles' counsel had gone too far in cooperating with probation staff, in effect acting as agents of the court and depriving the juveniles of competent counsel.

was often viewed as most helpful when willing to join with the court in securing from the youth acknowledgement of responsibility for delinquent behavior, if such were the case, and cooperating in the imposition of substantial supervision or perhaps even institutional confinement when needed to effect rehabilitation. However, *Gault* tends to de-emphasize this kind of participation as the primary obligation of defense counsel. The current inabilities of the system to deliver on its therapeutic rationale suggest that the refocusing may be a wise move.[99] In explicit efforts to come to grips with these difficult problems, falling back on traditional concepts of adversary representation, in the most responsible sense, seems to offer the most sensible point of departure. Certainly this does not preclude advice by attorneys concerning the importance of accepting responsibility for misconduct and even accepting sanctions calculated to help the juvenile offender. What it does seem to require, however, is that in juvenile court, as elsewhere, the lawyer owes a duty to present all defenses and seek the results desired by his client when he appears on the child's behalf.

A special role problem confronting counsel in delinquency cases derives from the dual interests of child and parents.[100] *Gault* does little to shed light on the variations in parent-child interest that might bear on representation rights in juvenile proceedings. In narrowest terms, it would seem reasonable to conclude that *Gault*, by virtue of the limitation of sixth and fourteenth amendment guarantees to the "accused," guarantees the right to counsel only to the juvenile and not his parents. Thus, where the interests of child and parent diverge, as where the complaint is initiated by a parent, or even where important disagreements arise, such as to responsibility for or the essential facts of the misconduct, it would seem that the allegiance of constitutionally appointed counsel must lean toward the juvenile. This, of course, is a delicate area for counsel and little benefit

99. The Supreme Court in *Gault* made clear its views as to the juvenile court's inability to fully meet initial promises. 387 U.S. 1, 21-23 & n.30 (1967). *See* Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME & DELINQUENCY 97 (1961); Note, *Rights & Rehabilitation in Juvenile Courts*, 67 COLUM. L. REV. 281, 320 (1967) (impact of judicial process on rehabilitation).

100. In the survey of juvenile court judges previously cited, inquiry was made as to who was represented most often in delinquency cases. The majority of the responding judges (fifty-two percent) indicated "child and parents jointly" and a lesser number (fourty-four percent) representation of the "child alone." The researchers found this revealing:

> [i]t is interesting to note how many judges viewed delinquency appearances as representation of "child and parents jointly" although, technically, it is only the child against whom a delinquency petition is filed and who would require legal defense. The fact that judges saw such representation as on behalf of both child *and* parents probably comports with the realities of the situation and the loyalties of the family retained lawyer, even if beyond the demands of the proceeding.

Skoler & Tenney, *supra* note 84, at 82-83.

would be derived from impairment of family unity or loyalties by unnecessary disregard of parental concerns. Indeed, *Gault* makes it clear that parents are important instrumentalities, along with counsel, for protection of the child's procedural rights. Their role or involvement is specifically mentioned in connection with notice of right to counsel, waiver of such right, and exercise of the privilege against self-incrimination.[101] Whether in conflict of interest situations a court must appoint counsel for the parents as well as the child would seem to be a matter for local determination. Some juvenile court acts which specifically provide for appointment of counsel in indigency situations seem broad enough to permit this result.[102]

A final issue that merits consideration is whether only legally trained counsel can meet the constitutional requisites of juvenile court representation. Particularly at the disposition stage, where difficult judgments as to courses of treatment or behavior modification are in contention, it might be questioned whether lawyers offer the best combination of skills for effective representation of the child's interests. A recent case raised just this question in considering a claim of right to counsel in a school disciplinary proceeding[103] and one scholar has attracted much attention with a proposal to staff an adversary juvenile court trial system entirely with professionally trained non-lawyer personnel.[104] The writer makes a persuasive case in terms of training, commitment, and staffing feasibility for substitution of the social worker for the attorney as juvenile court advocate. The existence of highly professional juvenile court systems manned by lay judges, as in England, gives further pause as *Gault* operates to inject not merely a trained advocate, but a discipline perhaps not optimally suited for the role, into the treatment milieu of the juvenile court.

The case, of course, can be overstated. Adjudicative hearings,

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101. 387 U.S. 1, 41-42, 55 (1967).

102. *See, e.g.,* CAL. WELF. & INST'NS CODE § 634 (West 1966) (specifically authorizing dual appointment in conflict of interest situations); IDAHO CODE ANN. § 16-1631 (1963); WIS. STAT. ANN. §§ 48.25(5)-(6) (1957). Other statutes specifically limit appointment appointment in delinquency cases to counsel for the child. N.Y. FAMILY CT. ACT § 246 (McKinney 1963); ORE. REV. STAT. § 491.494 (1967).

103. Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967). That constitutional right to counsel requires representation by duly licensed attorneys seems to be generally recognized under state court decisions. Annot., 68 A.L.R.2d 1141 (1959). But court provision of non-lawyer counsel on a voluntary acceptance basis (or to substitute for lawyer counsel at disposition) could be accepted as a waiver of the right to an attorney. *See In re* Custody of a Minor, 250 F.2d 419, 421 (D.C. Cir. 1957), where, in holding that a court director of social work was in effect adequate counsel in a neglect proceeding, the court noted that the child was afforded "not only legal counsel experienced in such matters but social and medical counsel as well."

104. Handler, *The Juvenile Court and the Adversary System; Problems of Function and Form*, 1965 WIS. L. REV. 7.

particularly contested ones, will continue to require skills in which lawyers are likely to excel. Conceding that the disposition determination will continue as the only critical issue in the vast majority of delinquency cases reaching the formal hearing stage, one can point to a significant, albeit recent, movement in legal education to enhance the young lawyer's competencies to participate in this area.[105] Accompanying this movement has been a visible awakening of interest among law students in career work in criminal law, family law, and related social problem areas. The point to remember, as we seek to fashion juvenile court systems into more effective instrumentalities, is that neither the Constitution nor juvenile court doctrine demands an exclusive license for lawyers as "advocate" or "counsel" in this forum. It might be unfortunate to fail to recognize this in determining the bounds of future experimentation and inquiry.

CONCLUSION

Gault has affirmed what an increasing body of legal opinion has contended ever since the Supreme Court determined that counsel was constitutionally required for indigent accused in serious criminal cases—that the right to counsel applied to juvenile offenders as well. The full scope of the right in juvenile cases remains to be established but, following adult analogies and recognizing the special disabilities of children before law, a broad definition of the scope seems justified. Provision of counsel will undoubtedly have an impact on the processes of juvenile court justice and offer a challenge to the informal and therapeutic orientation that has characterized the court since its inauguration. The prospects for a satisfactory accommodation, however, are good and there is at least the potential for enhancing not only the legal process in juvenile courts, but the court's overall capacity for special help to children.

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105. *See* OFFICE OF JUVENILE DELINQUENCY & YOUTH DEVELOPMENT, U.S. DEP'T OF HEALTH, EDUC., & WELF., THE EXTENSION OF LEGAL SERVICES TO THE POOR 165-90 (1964); Skoler, *Law School Curriculum Coverage of Juvenile and Family Court Subjects*, 5 J. FAMILY L. 74 (1965). Law school response has been matched, and probably surpassed, by an intensive continuing education effort in the past decade to enhance capabilities and meet in-service training needs of the nation's juvenile court judges. *See* NATIONAL COUNCIL OF JUVENILE COURT JUDGES, VENTURES IN JUDICIAL EDUCATION 22 (1967); Rose & Skoler, *Continuing Education for Juvenile Court Judges*, 48 J. AM. JUD. SOC'Y 225 (1965).